Nos. 88-854, 88-856, 88-870

FILED
JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

HENRY SPALLONE; PETER CHEMA; NICHOLAS LONGO and EDWARD FAGAN,

Petitioners,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT YONKERS BRANCH, NAACP, ET AL

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38 pp

TABLE OF CONTENTS

Pages

Table of Authorities ii

Statement of the Case 1

Summary of the Argument 13

Argument

A. The District Court Had The Authority To Enforce Its Orders, Including The Imposition Of Contempt Sanctions Against Petitioners 16

B. The District Court Had No Less Intrusive Alternative 19

C. The Doctrine of Legislative Immunity Does Not Control This Case 21

D. Petitioners Have No Independent First Amendment Right Which Permits Them to Violate This Court Order 27

E. The Long Term Ordinance Was Fully Consistent With The Consent Decree 30

F. The Consent Decree Was Fully Consensual.....30

Conclusion 31

TABLE OF AUTHORITIES

Case *Page*

Bond v. Floyd, 385 U.S. 16 (1966).....29

Boos v. Barry, 99 L. Ed. 2d 333 (1988).....28

Bruce v. Riddle, 631 F. 2d 272 (4th Cir. 1980).....22

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La.), *aff'd sub nom Denny v. Bush*, 367 U.S. 908 (1961).....22

Butz v. Economou, 438 U.S. 478 (1978).....16

Delaware Valley Citizens v. Commonwealth of Pennsylvania, 678 F. 2d 470 (3rd Cir. 1982).....16,17,18

Eastland v. United States Servicemen's Fund, 423 U.S. 491 (1971).....21

Gary W. v. State of Louisiana, 622 F. 2d 804 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981).....20

Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980), *reh'g granted*, 636 F.2d 942 (1981).....18,20

Gates v. Marino, 106 A.D. 2d (2d Dept. 1984).....21

Gravel v. United States, 408 U.S. 606 (1972).....26

Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).....25,26

Hutto v. Finney, 437 U.S. 678 (1978).....18,26

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).....22,23

Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986).....17,18

Meyer v. Grant, __ U.S. __, 108 S. Ct. 1886 (1988).....28

Milliken v. Bradley, 433 U.S. 267 (1977).....26

Nebraska Press Association v. Stuart, 423 U.S. 1319 (1975).....26

New York Times Company v. Sullivan, 376 U.S. 254 (1964).....29

Owens v. City of Independence, 455 U.S. 622 (1980).....24

Regal Knitwear Company v. N.L.R.B., 588 F. Supp. 664 (W.D. Wisc. 1983).....17

Shillitani v. United States, 384 U.S. 364 (1966).....19

Shuffler v. Heritage Bank, 729 F. 2d 1141 (9th Cir. 1983).....19

Spain v. Mountanos, 690 F. 2d 742 (9th Cir. 1982).....20

Star Distributors Ltd. v. Marino, 613 F. 2d (2d Cir. 1980).....22

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).....21

Taylor v. Haynes, 418 U.S. 488 (1974).....29

Tenney v. Brandhove, 341 U.S. 367 (1951).....21,23

Thomas v. City of Evanston, 636 F. Supp. 587 (N.D. Ill. 1986).....17

United States v. Chicago Board of Education, 567 F. Supp. 272 (N.D. Ill. 1983).....16

United States v. City of Miami, 664 F. 2d 435 (5th Cir. 1982).....18

United States v. Nixon, 418 U.S. 683 (1974).....26

United States v. United Mine Workers, 330 U.S. 258 (1947).....16

United States v. Yonkers Board of Education, 624 F. Supp. 1276 (S.D.N.Y. 1986) *aff'd* 837 F. 2d 1181 (2d Cir. 1987), *cert. denied*, __ U.S. __, 108 S. Ct. 2821 (1988).....1

United States v. Yonkers Board of Education, 635 F. Supp. 1577 (S.D.N.Y. 1986) *aff'd in all respects*, 837 F. 1181 (2d Cir. 1987), *cert. denied*, __ U.S. __, 108 S. Ct. 2821 (1988).....2

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 108 S. Ct. 2268 (1988).....14

Wrzeski v. City of Madison, 558 F. Supp. 664 (W.D. Wisc. 1983).....28

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, sec. 6, cl. 1.....3

U.S. Const. amend. I.....26

U.S. Const. amend. XIV 24

STATUTES, REGULATIONS and RULES

42 U.S.C. sec. 1983.....15

42 U.S.C. sec. 5301 *et seq.*.....7

N.Y. Pub. Off. Law sec. 2 (McKinney 1988).....13

OTHER AUTHORITIES

Hamilton, Madison & Jay, *The Federalist Papers,* 50 Mentor Books, 1961 29

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BRIEF FOR RESPONDENT YONKERS BRANCH, NAACP, ET AL

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1. STATEMENT OF THE CASE

This matter comes before the Court during remedial stages of an acrimonious and bitter lawsuit involving segregation of residential patterns and schooling in Yonkers, New York.

For several decades, black and Hispanic residents were intentionally segregated by the acts and omissions of the Yonkers City Council and the Yonkers Board of Education. The district court's liability opinion in *United States v Yonkers Board of Education,* 624 F.Supp. 1276 (S.D N.Y 1985), *aff'd* 837 F.2d 1181 (2d Cir. 1987), *cert. denied,* __U.S.__, 108 S. Ct. 2821 (1988) outlines in detail the pattern and practice of conduct these elected council members followed. These acts and omissions were gross; overtly and intentionally racist and represented capitulation by Yonkers politicians, including several now before this court, to the community will. This rampant majoritarianism trespassed the constitutional and civil

rights of racial minorities and the courts have so held.[1]

While the current petitioners do not directly challenge these judicial findings, each seeks in one or another way to ignore their clear import—that the class represented by plaintiff-intervenors is entitled to a prompt remedy of these segregative practices as a matter of first moment—and that federal courts have broad equitable authority, as well as solemn responsibility, to ensure provision of such relief.[2]

In May 1986, after a remedial hearing at which defendant City of Yonkers was represented, the district court entered a Housing Remedy Order (herinafter "HRO") (A-19-34) which provided, *inter alia* (a) that within ninety days, the City of Yonkers would submit to HUD suitable sites for the location of 200 units of public housing (A-26-28) and (b) that by November 15, 1986, the City would develop and submit to the court a long term housing plan (A-30-31).[3] *United States v. Yonkers Board of Education*, 635 F.Supp. 1577 (S.D.N.Y. 1986), *aff'd in all respects*, 837 F.2d. 1181 (2d Cir. 1987), *cert. denied*, __U.S.__,

1. The district court so held after a ninety-two day trial in which the primary focus (on the housing side of the case) was the actions of the Yonkers City Council. That body repeatedly vetoed suitable sites for assisted housing in white neighborhoods and refused to accept section 8 existing housing certificates for families out of fear of minority mobility into white neighborhoods. Numerous city council members testified at trial, either through deposition or courtroom appearances.

2. The district court granted the NAACP's motion to intervene in June 1981 and the following year found the Branch and Charlotte Ryer, a black parent who resided in subsidized housing, to be adequate representatives of the class of those discriminated against in both spheres of social life. No party appealed either order.

3. As this Court has expressly provided, during the remedial proceedings, the district court gave defendants the initial opportunity to devise a remedy plan. Thus, within one month of issuing its liability opinion, the district court held a conference at which it allowed defendants two months to submit their proposals. The City's proposal, reflecting the thinking of its council members, abdicated all responsibility for a remedy and threw the responsibility for devising a remedy back to the plaintiffs and the district court. For instance, the City proposed using two sites for the 200 units of public housing it promised HUD it would build as early as 1981. The city submitted these sites despite the fact that HUD already had rejected both as not advancing the objective of providing integrated residential opportunities for potential residents of public housing.

108 S. Ct. 2821 (1988).[4]

Though it failed to obtain a stay of the HRO from either the district court; the Second Circuit or this Court, the City acted as if a stay had been entered and refused to comply with its express terms. Thus, the City Council failed to submit suitable sites for the location of 200 units of public housing. This inaction triggered operation of Section V. of the HRO in which the district court had pre-selected several "back-up" sites for submission to HUD in the event the City Council failed to do so. (A-28-29). Likewise, in November 1986, the City Council refused to submit a long-term housing plan, clearly violating Section VI of the HRO. (A-30-31). The refusal came in the form of a one-page letter from counsel for the City simply relating the City Council's unwillingness to comply.

In late November-December 1986, both plaintiffs, the United States and the Yonkers Branch, NAACP, et. al. (hereinafter "NAACP"), representing the class of black and Hispanic persons currently occupying and eligible for occupancy in assisted housing, moved to hold Yonkers in contempt of court. In addition, the NAACP requested that the district court exercise its equitable authority and appoint a Master to perform remedial tasks which Yonkers refused to discharge , i.e., the designation of additional sites for the placement of public housing and the development of the long term housing remedy plan.

In February 1987, the district court required Yonkers to employ an "Outside Housing Advisor" (hereinafter "OHA") to identify additional sites for the first 200 units of public housing and to draft a long term housing plan for the City. *See*, A-28, Sec.IV. (f). Initially, the OHA held a dual role-working

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4. Yonkers' appeal, rejected in toto by the Court of Appeals for the Second Circuit in December 1987, dealt with issues of liability and remedy. In mounting this appeal, the City did not contest as clearly erroneous *any* finding of fact entered in the district court's 600 pages decision.

with the City of Yonkers and assisting the court as its expert.[5]

Through the spring and summer of 1987, the OHA located publicly-owned parcels upon which the initial public housing units could be placed. Repeatedly, the Yonkers City Council refused to manifest any good faith. Instead, it continuously stalled the remedial process. For instance, on April 21, 1987, the Council tentatively expressed support for the placement of 200 units on at least 8 sites, *provided that* local neighborhood groups would control tenant selection; no implementation of the remedy would proceed until Yonkers had exhaused all its appellate rights and the long term housing plan was limited to no more than 200 additional units of assisted housing. (A-39, 65-68). The district court rejected these conditions and an Order the City proposed to modify the HRO to reflect them. (A-71-74).[6]

In June-July 1987, the City Council refused to pass a resolution requesting that Westchester County release its reverter interest in certain vacant land the OHA has found suitable for use in the housing remedy. Cf. A-87-97 and

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5. By this time, the U.S. Department of Housing and Urban Development (HUD), which is to fund the construction of the 200 units of public housing, had approved four sites: Whitman; School 4; School 30 and Lincoln, for 160 units of public housing. The OHA's immediate task was to identify additional sites for the remaining 40 units and to build consensus within the City Council in support of these sites. Responding to City Council sentiment and in concert with his own views as a planner, the OHA determined that additional sites would more appropriately "scatter" the low income housing units, causing less impact on extant communities. From March-December 1987, the OHA identified numerous sites suitable for the placement of such units. Through 1987, the Yonkers City Council refused to accede to the use of any such site.

6. In appointing the OHA and charging him with developing a long term housing plan, the district court requested that he consider the steps needed to implement such a plan assuming, in the alternative, a requirement for the provision of 200, 400, 600 *or* 800 units of subsidized housing. It was in this context that the City Council conditioned any cooperation regarding public housing to an *a priori* limitation of 200 units of subsidized housing. At the time the Council imposed this condition to further cooperation, the OHA had just begun his work on the long term housing plan.

A-104-108.[7] Instead, the Council continued to condition its compliance with the HRO on new conditions of its own creation. *See, for example,* A-112, comments of Mr. Sculnick, Council for Yonkers.

In short, by every means possible, Yonkers Council members sought to sabotage implementation of the housing remedy.[8] At the same time, the district court showed extraordinary patience, assuring Yonkers that if its City Council did, in good faith, come forward with a workable alternative to the HRO, it could be "sympathetically considered". (A-137-140).

With Yonkers' defiance persisting, the district court ordered the OHA to desist from actively working with the City Council and to serve exclusively as the court's expert in housing matters.

In seeking re-election to the Council in November 1987, three petitioners, Longo; Fagan and Spallone, repeatedly railed against the district court and pledged to do all within their power to resist implementation of the court's remedy orders.[9]

By summer 1987, all parties agreed to a scattered site approach to the location of the 200 units. No party favored the erection of high rise public housing "projects." However, implementation of this less dense approach required identification and control over sites. The City offered no cooperation what-

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7. On April 21, 1987, the OHA provided the court and the parties with a description of many of these publicly-owned sites (A-48-64). A number of these parcels had been given to Yonkers by the County of Westchester in the early 1960's. The county held reverter interests in them and, arguably, before using them for anything but park purposes (for which none was then being used), the City needed County consent. Yonkers refused to seek this consent and did so only under express court order and then in a manner the district court found calculated to communicate to the county its *lack* of desire to obtain the necessary consent (A-153-167).

8. We note that Longo and Fagan make no mention of any of this contemptuous conduct in their Brief. *See,* p. 4.

9. Three of the petitioners likewise opposed the Council majority's modest efforts in the summer of 1987 to propose an alternative remedy plan to that embodied in the HRO. A-144-147 (see negative votes of Spallone, Longo and Fagan).

soever. Finally, having fruitlessly exhausted the possibility of obtaining site control over numerous publicly-owned parcels in which Westchester County held a reverter interest, in November 1987, the district court requested the OHA to identify suitable privately-held sites. The district court indicated that it contemplated an order requiring Yonkers to condemn private parcels deemed needed to implement the short term remedy order.

In early December 1987, the OHA provided a list of nine privately-owned properties which he deemed suitable for public housing. A planning firm retained by Yonkers commented favorably on a number of these sites, as did the other parties.

On December 15, 1987, the district court ordered Yonkers to show what it had done to implement the housing remedy order (A-171). On December 28, 1987, the Court of Appeals for the Second Circuit upheld Judge Sand's liability decision and remedy order in all respects. 837 F.2d 1181.

Several days before Yonkers was due in court to show what it had done to implement the housing remedy order, the City's newly retained counsel contacted counsel for the United States and the NAACP and offered to engage in settlement discussions. The district court agreed to a one-week delay in the scheduled proceedings (A-179).

As it turned out, for the next two and one-half weeks, the parties engaged in negotiations. On January 19, 1988, the district court convened the prior scheduled return on its order to show cause. By then, Yonkers had failed to adopt a required Housing Assistance Plan (A-173-175). The district court required the City Council to enact such a resolution (A-175). In so proceeding, Judge Sand stated, "The time has come—let me speak colloquially—for an end to the game playing. Everyone in this courtroom knows what is meant by the adoption of a HAP, and what its terms and regulations should be; but let me say further, to regard the HAP and the passage of a HAP as being a statement by all who speak for Yonkers, that there is an acceptance of the obligation to comply with the federal court and that with that goes a good-faith cooperation and participation in the process of implementing the housing remedy order." (A-176). The district court continued, "The issues transcend Yonkers.

They go to the very foundation of the system of constitutional government. If Yonkers can defy the orders of a federal court in any case, but especially a civil rights case, because compliance is unpopular, then our constitutional system of government fails." (A-177).

Judge Sand indicated that Yonkers would be fined should the Council fail to pass the required legislation (A-177-178). Later that afternoon, counsel for the City advised the court that the City Council had agreed to convene the next day to pass the required legislation (A-183).

On January 25, the parties represented that they had reached an agreement to settle the housing aspects of this protracted litigation.[10] Counsel for Yonkers described the Consent Decree and in most relevant part stated,

> "The Court: I understand that there is some legislation that is contemplated.
>
> Mr. McAmis: Yes, Your Honor, the City will pass legislation to the effect that until the goal (of 800 units of

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10. Chema (Brief at 4) cites threats made by the district court on January 19, 1988. Seen in context, these comments by Judge Sand represented growing frustration with the pace of negotiations initiated by the City earlier that month. What had occurred was this: in previous years, the City Council had refused to pass a Housing Assistance Plan or HAP, one component of an application for federal Community Development Block Grants. *See*, 42 U.S.C. sec. 5301, *et seq*. During the 1988 negotiations, the United States insisted that as a showing of good faith, the City Council pass the required HAP. When the City Council refused, negotiations bogged down and the parties appeared before the district court on January 19, 1988 in that light. Contrary to Chema's ill-informed suggestion, the City conceded that it had failed to pass the required HAP and the Council had recalcitrantly and knowingly failed to do so.

In this context and with negotiations toward a settlement finally proceeding, the district court reasonably entered its order requiring that members of the Council stay in the jurisdiction.

With regard to Chema's suggestion that it was the district court which sought or escalated controversy, nothing could be further from reality. Rather, 18 months after the City Council had flatly refused compliance with the Housing Remedy Order, the district court continued to hope for and await cooperation. By January 1988, the district court made clear, however, that time was running out for the City and that more coercive and expensive measures would be instituted absent some change in municipal conduct.

affordable housing) is reached, only assisted and private housing that has an assisted component would be permitted in Yonkers . . ." (A-193)

The City's counsel then requested a brief recess to allow the Yonkers City Council to consider and adopt the settlement. The district court agreed.[11] On January 27, 1988, the City Council approved the First Remedial Consent Decree in Equity by a vote of 5-2 (A-216-223).

The Decree committed Yonkers to use three publicly-owned and four privately-held sites for the 200 units of public housing. (Section 2. at A-217).[12] In addition, Yonkers agreed to the central elements of the long term housing plan. Specifically, the City agreed within ninety days to "adopt . . . legislation (a) conditioning the construction of all multi-family housing . . . on the inclusion of at least 20% assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided that such changes are not substantially inconsistent with the character of the area . . .". In addition, Yonkers agreed not to perfect any further appeal of the Court of Appeals' affirmance of the housing remedy order. Section 10, A-219.

Within six weeks, turmoil embroiled the City. Two Council members who voted for the Consent Decree, Longo and Fagan, had run in the 1987 election, as in previous municipal campaigns, on a platform of defying the federal courts. Their changes of position engendered tremendous community hostility and resentment. In addition, citizen groups expressed outrage that the City Council had given away the right to seek certiorari in this Court from the affirmance of the district court's liability

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11. On January 25, 1988, petitioner Spallone sought to address the district court. Judge Sand responded, "Mr. Spallone, you speak through your counsel." (A-203).

12. Yonkers agreed to purchase these properties through condemnation proceedings, if necessary. Section 4, A-218.

and remedy orders rendered by the Court of Appeals for the Second Circuit. City council meetings became wild spectacles during which no business could be conducted.[13]

In March 1988, less than two months after signing the Consent Decree, the City moved to modify it by deleting Section 17 in which it waived appellate rights. The district court denied this motion. One month later, on May 2, 1988, Yonkers moved to vacate the entire Consent Decree asserting that the support of John Cardinal O'Connor had been material to Yonkers' willingness to enter it and that His Eminence had since spoken negatively about certain aspects of the Decree (A-225-244).[14] Again, the district court denied the City any relief.[15]

Meanwhile, after two initial meetings with counsel for plaintiffs, the City refused to participate in drafting the Long Term Housing Plan, as contemplated in the January Decree. In

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13. Spallone suggests in his Brief that reciting the lengthy history of racial segregation and official discrimination which continued long after the Consent Decree was signed is "inflammatory and obfuscatory." (Brief at 5, n. 7). We could not disagree more strongly. The district court did not here act in a vacuum, but only after faced with ongoing racial segregation and discrimination implemented by the ongoing conduct of the Yonkers City Council, with Henry Spallone as chief orchestrator. The choice the district court faced was whether to confront directly the contemptuous and highly disrespectful conduct of Spallone and his cohorts or to seek to circumvent them. While the NAACP has always felt that accentuating the madness projected by Spallone was a less desireable approach than strong remedial measures, we certainly believe the approach Judge Sand took to be one characterized by restraint; courage and patience and one fully supported by the law.

14. As Rex Lee, Esq. stated in arguing for the City's Motion to Vacate on May 19, 1988, "The fundamental mistake that was made on the part of all parties was a mistake in assumption as to the approach to the degree of support that would be given to this Consent Degree by the Cardinal and the Catholic Church." (A-265). In presenting this motion, as well as the one to modify the Consent Decree, the City represented the views of the majority of the City Council members and none had his own counsel.

15. The City did not appeal either the order denying its motion to modify or its motion to vacate.

May 1988, plaintiffs were forced to report the City's abdication of this responsibility. The district court ordered that the City experts, a private planning firm, Abelees & Schwartz, complete a draft of this Housing Plan, as required by the Consent Decree, for review by all parties and the court. On June 8, 1988, the district court entertained minor objections to the draft plan, accepting some of the City's suggested changes and rejecting others (A-275-302).[16]

On June 13, 1988, the district court entered the "Long Term Plan Order" (A-303-316), the Second Remedial Decree in Equity, noting that "The City has failed to take those actions which were the subject of Section 17 of the First Decree. The City has further informed the court and the parties that it will not negotiate toward reaching an understanding on certain other long term plan issues, as required by Section 18 of the First Decree." (A-303-04). The next day, the City Council refused to approve the long term order as its own and, instead, adopted Resolution No. 144-1988 which declared a moratorium on all assisted housing developments in Yonkers (A-317-319).

On June 21, 1988, the district court held a conference call to schedule the presentation to the City Council of the legislation necessary to implement the long term remedy order (A-322-344). The court directed that the council adopt on June 28, 1988, its next scheduled meeting, "the provisions of the consent decree and the long term plan." (A-335).

On June 28, 1988, the City Council defeated a resolution to declare its commitment to implement the long term plan (A-348). Instead, the Council resolved to halt condemnation proceedings required to acquire one of the parcels to be used for the 200 units of public housing (A-350). The next day, the district court ordered plaintiffs to devise a timetable for the City's implementation of the long term order at the risk of contempt. The plaintiffs proposed passage of the necessary legisla-

16. As Fagan and Longo concede, the long term plan was "derived from those provisions of the First Remedial Consent Decree in Equity." (Brief at 5). Moreover, the ordinance was written by the City's own planners and approved by counsel for Yonkers (Brief at 6).

tion by July 19. The City of Yonkers opposed plaintiff's proposed Order. The City did not raise any issue concerning legislative immunity, but, rather argued that any requirement by the district court would lead to further confrontation (A-351-52).

On July 12, 1988, the district court held another hearing to consider how to respond to the Council's refusal to endorse the long term housing plan. Judge Sand then broached for comment by the parties the creation of the Yonkers Affordable Housing Commission to replace the municipal zoning and land use apparatus and insure implementation of the housing remedy order.[17]

The City opposed creation of such a commision arguing that it was overbroad and contrary to the powers given by state law to Yonkers. Indeed, Yonkers specifically objected that no power allowed the district court to create a non-representative body to function as a legislature (A-377-379). No petitioner supported creation of the Affordable Housing Commission. Indeed, none offered any comment whatsoever. Only the NAACP supported the proposal, submitting that it properly focused on affecting a meaningful remedy in an expeditious manner.[18]

By late July 1988, the City Council continued to balk at passing the long term housing ordinance. Council members openly discussed their contempt for the district court and stated that their opposition was not so much to any provision of the long term housing ordinance as to the 200 units of *public* hous-

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17. "All of the governmental functions heretofore vested in the city council insofar as they relate to the housing envisioned by the housing remedy order, consent decree and long-term plan shall vest in the Yonkers Affordable Housing Commission including, but not limited to, adoption of zoning variances, density bonuses and any other actions necessary or appropriate to facilitate construction of said housing." (A-358).

18. Petitioners suggest that the district court failed to adopt a less intrusive alternative when it required adoption of an ordinance the City Council had previously committed to adopt rather than take over municipal operations in the areas of land use and zoning, at least insofar as necessary to assure implementation of the goals set forth in the First Consent Decree. None of the petitioners took this position in the district court, either before July 26, 1988 or at their contempt hearings.

ing.[19]

On July 26, 1988, the district court ordered that the City Council comply with the Consent Decree by passing the long term ordinance within five days or face contempt of court. (A-397-400). Later, after learning that the Council members wished to have a public hearing ten days before voting on the ordinance, the court amended its order to require only that the legislators indicate their intention to adopt a long term ordinance within the minimum time prescribed for notice pursuant to state law (A-401). In fact, the district court made clear that the Council could pass a modified ordinance, so long as they acted and demonstrated some measure of good faith.[20]

The Council refused. On August 1, 1988, by a four to three vote, the Council failed to adopt the ordinance or to indicate a willingness to pass any such ordinance.

On August 2 and 4, the district court provided the council members an opportunity to be heard on why they should not be held in civil contempt and subjected to the previously announced consequences. None presented any justification for his failure to vote for the legislation contemplated by the Consent Decree. None offered to discharge this obligation with regard to a modified ordinance. The plaintiffs showed that the latest example of contempt simply perpetuated years of resistance by these individual council members to the vindication of federal fair housing rights and should be seen as nothing more nor less. The district court found the council members in civil contempt; fined them $500 for each day their contempt continued and

19. Chema distorts this history by suggesting, for instance, that the City's effort to put off votes on the ordinance had something to do with dissatisfaction over *its* terms. (Brief at 8). To the contrary, as the City submitted at the time, disaffection with the locations of the 200 units of public housing had so enveloped the community and the City Council that no action in support of *any* aspect of the Housing Remedy Order was thinkable at the time.

20. Predictably, the City requested that the district court "deem" everything accomplished. In this manner, the City Council would be required to take no positive action curing its constitutional violations and its members could continue to rail against a tyrannical judge who Spallone repeatedly compared to Hitler and Stalin.

reiterated that, after ten days of such contempt, he would order them jailed. In addition, the district court levied a fine of $100/day, doubling each day, against the City of Yonkers.

In light of the legal issues presented, some other factual background appears important. First, neither the United States nor the NAACP ever instituted a civil action against any individual council member under 42 U.S.C. section 1983. Second, under New York law, individual council members are officers of the City, N.Y. Pub. Off. Law §2 (McKinney 1988) and they are bound to obey orders issued by courts of competent jurisdiction. In this particular case, as officers of the City, all City Council members were represented by counsel for the City of Yonkers until sometime after July 26, 1988, when counsel for the City declared that a conflict of interest prevented him from representing the City and the individual council members retained their own counsel.

II. SUMMARY OF ARGUMENT

A district court has broad equitable powers to implement a remedy to match the scope of adjudicated constitutional violations. Here, in the first instance, the district court appropriately permitted defendants to propose remedial measures. They refused. After notice, the district court then conducted extensive remedial proceedings which occasioned entry in May 1986 of the Housing Remedy Order (hereinafter "HRO"). The City of Yonkers, which can legislate only through the City Council, steadfastly refused to implement major aspects of the HRO. Plaintiffs then moved for a citation of civil contempt. Instead, the district court employed an outside advisor to advance implementation of the plan. Still, Yonkers refused to cooperate and effectively delayed implementation. Indeed, through calendar year 1987, the City Council would not identify any sites for public housing and failed to cooperate as the district court sought to assemble suitable sites.

By the summer of 1988, the City Council had demonstrated a contempt for the power of the federal court and for the rule of law. After adoption in January 1988 of the First Remedial Consent Decree in Equity, the Council refused to discharge its terms. Instead, it repeatedly acted to thwart implementation.

Finally, after the City Council refused to adopt *any* long

term housing plan, as squarely required by the Consent Decree, on July 26, 1988, the district court gave the Council members one last opportunity. When they refused to act, the district court held non-compliant members in contempt of court and fined them.

In these circumstances, the district court properly exercised equitable authority. After displaying commendable patience, the district court chose to uphold the rule of law against the excesses of the City council members. In so acting, the district court rejected two alternatives: creating an Affordable Housing Commission or "deeming" the necessary legislation passed. Adoption of either alternative would have been more intrusive on the legislators' authority and more disruptive of local autonomy. No petitioner supported either course of action. In proceeding as it did, the district court properly exercised its discretion.

Unlike *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S.Ct. 2268 (1988), this case raises no issue as to the district court's underlying subject matter jurisdiction. Nor in light of Judge Sand's extraordinary restraint can any petitioner seriously urge that the district court acted spasmodically or radically. Indeed, the district court clearly sought to preserve the sanctity of the rule of law against the politically motivated and racist excesses of a mob, typified by the four petitioners.

The doctrine of legislative immunity does not establish a bar to the reasoned exercise of the district court's equitable authority. Other courts have ordered state and local legislative bodies to take steps necessary to vindicate constitutional rights. Here, there is no quarrel but that the long term housing legislation served that same purpose. Thus, even absent the Consent Decree, the district court would have been justified in finding legislators in contempt for failure to take actions necessary to vindicate constitutional rights.

But, unike some contexts where federal courts have ordered legislative action, here, the Yonkers City Council agreed to adopt the long term housing ordinance. The body refused to follow through only in capitulation to the same kind of public opposition which the courts below have found to be

racist in motivation and discriminatory in effect.

Recognizing the appropriateness of the district court's action does not compel rejection of the doctrine of legislative immunity for local legislators. But, conversely, recognizing the vitality of the latter doctrine does not compel reversal here. The policy considerations which inform that common law doctrine do not apply in this situation. Here, no legislator was sued in his individual capacity under 42 U.S.C. sec. 1983. None was forced to defend discretionary actions taken in the course of normal legislative action. No claim of violation of constitutional right was asserted in the liability phase of this case against individual council members. Instead, in remedying adjudicated constitutional violations, the district court entered orders which petitioner/legislators thwarted. Still, the district court held off action against the legislators.

In January 1988, the legislature entered into a Consent Decree which compelled the body to enact certain legislation necessary to cure constitutional violations. The district court entered this order on consent and its obligations became binding upon all parties, including each City Council member as all served as the City's officers and agents for its purposes. Even without such consent, the orders against the individual council members were necessary to vindicate constitutional rights protected by the Fourteenth Amendment.

The law recognizes no exception permitting City Council members to be excused from compliance with the terms of a Consent Decree or a court order. Permitting such an exception will render any agreement with a municipal body untenable. Any such defendant could simply escape from compliance by refusing to discharge its agreed-upon duty with absolutely no consequences for the members committed to comply. The court would then be left with the daunting task of taking over municipalities as the means of enforcing compliance.

Likewise, legislators' right to freedom of speech was not extinguished when the district court ordered council members to discharge the duties undertaken in the Consent Decree. Members were free to speak out, as they continued to do, in defiance of the district court and in objection to the liability findings and remedy order. What legislators could not do, however,

was to violate the terms of the Decree as they did when they refused to adopt *any* long term housing ordinance, as it required. No case cited by petitioner Chema holds or suggests that the First Amendment bars a federal court for entering orders required for the discharge of undertakings previously made by a legislative body or orders requiring legislative action itself if necessary to purge violations of constitutional law.

This is not an instance where a legislative body has sought to compel speech or a vote, for that matter. It is an instance where local legislators have sought to wriggle out of commitments made by their body to a federal court.

III. ARGUMENT

A. THE DISTRICT COURT HAD THE AUTHORITY TO ENFORCE ITS ORDERS, INCLUDING THE IMPOSITION OF CONTEMPT SANCTIONS AGAINST PETITIONERS

Article III courts have inherent authority to enforce their own orders. "An order issued by a court with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. United States Mine Workers,* 330 U.S. 258, 293 (1947).

Absent such authority, a district court becomes a mere advisory body and disrespect for the law is advanced. This is particularly true where public officials are involved, for their flagrant disrespect for the law is contagious and their conduct acts as a paradigm for ordinary citizens. *Butz v. Economou,* 438 U.S. 478, 506 (1978) ("Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law . . ."); *United States v. Chicago Board of Education,* 567 F.Supp. 272, 284 (N.D.Ill. 1983).[21]

Upon entry, a Consent Decree becomes a binding court order. *Delaware Valley Citizens v. Commonwealth of Pa.,* 678

21. Contrary to Spallone's alarmist invocation of the image of a lower court "running roughshod over local legislators, (Brief at 13), this case presents the spectacle of local legislators acting above the law. Spallone has publicly compared a tempered federal judge to Stalin and Hitler; has pledged resistance to the law whatever the personal cost and has built a political career running against the civil rights of racial minorities.

F.2d 470 (3d Cir. 1982); *Thomas v. City of Evanston*, 636 F.Supp. 587 (N.D. Ill. 1986). Moreover, the officers and agents of a municipal entry, like any other party, are fully bound by the dictates of an order. *Delaware Valley*, at 476. They are not "strangers" to the Decree as petitioners submit, but rather the Council's approval of the Decree preceded and predicated its entry which bound all its members.[22]

F.R.Civ.P. 65(d) insures that a party cannot slither out of compliance with injunctions via the fancy footwork of those associated with it. Persons identified with a party; in privity with a party or acting for the party all are bound by injunctions.[23] A contrary rule would allow a defendant to nullify an injunction through the acs or omissions of its officers or agents. *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945).

That a particular agent may not have consented to entry of an order has no relevance to Rule 65(d). This principle fully applies to municipalities which are under court order. A Consent Decree binds signatories and their agents and each City Council member falls within that category regardless of whether he individually approved the Decree. Nor does the absence of individual legal representation at the time of the Decree's entry modify the legislators' obligation to comply with entered

22. This well-settled doctrine stands squarely against petitioner Spallone and Chema's suggestion that because they failed to vote for the Consent Decree, the consequent court order does not bind them. The Yonkers City Council acts upon majority vote and the majority binds all members and city officials. In any event, the Consent Decree, once entered, does not selectively apply to council members who favored it, the rather absurd position advanced by Spallone and Chema, any more than would a court order, entered independent of a Consent Decree, apply only to defendants who expressly agreed with it.

23. Of course, where a third party does not have any such relationship with the parties to a Consent Decree, *their* consent cannot bind it. *Local Number 93 v. City of Cleveland*, 106 S.Ct. 3063, 3079-3080 (1986). Petitioners' citation to this case are inapposite as their relationship to the City of Yonkers is, of course, juridically distinguishable from that the union in *Local Number 93* held to either party.

orders. *Delaware Valley Citizens Council v. Com. of Pennsylvania*, 678 F.2d 470, 474 (3d Cir. 1978) (finding that state legislators' interests represented by counsel for Commonwealth).

In the instant setting, the district court entered a Consent Decree by which the City of Yonkers had bound itself, through the January 27, 1988 vote of its City Council, to enact legislation necessary to vindicate constitutional rights. The relevant municipal officers then repeatedly and wilfully failed to discharge their obligations.

In such a circumstance, the district court had clear authority to enforce its orders, both the underlying Housing Remedy Order; the referenced Consent Decree and the Order of July 26, 1988, through use of traditional sanctions, including a holding of civil contempt and the imposition of jail time, if necessary to compel compliance. *Mine Workers, supra.*, at 332 ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt."); *Hutto v. Finney*, 437 U.S. 678, 690-91 (1978). *Local 93, International Association of Firefighters, AFL-CIO v. Cleveland*, 106 S.Ct. 3063, 3076 (1986) [24]; *United States v. City of Miami*, 664 F.2d 435, 440, n.8 (5th Cir. 1982); *Gates v. Collier*, 616 F.2d 1268, 1271 (5th Cir. 1980); *reh'g granted*, 636 F.2d 942 (1981) ("where a state expresses its unwillingness to comply with a valid judgment of a federal district court, the court may use any of the weapons generally at its disposal to ensure compliance. Federal courts are not reduced to issuing [judgments] against state officer and hoping for compliance. citations omitted.").

In reviewing a holding of contempt and the imposition of sanctions, this Court has adopted an abuse of discretion test. *Hutto, supra.*, at 690; *Delaware Valley Citizens Council, supra.*, at 478. When, for instance, civil contempt sanctions are

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24. Unlike the situation in *Local Number 93, supra*, at 3075-76, here the Consent Decree alone was not "the source of the court's authority to enter into any judgment at all." Instead, the Consent Decree implemented the prior HRO, itself predicated upon the scope of defendant City's violations of constitutional law and statute.

not intended to coerce a required action, but are rather punitive, they may represent an abuse of discretion. Where the contemnor does not hold the keys to the prison cell and cannot purge his own contempt status, such sanctions are likewise inappropriate. But, here, no such contention is advanced. Each contemnor could have quite simply cured his contempt by voting as required by the Consent Decree.

This, indeed, represented a garden-variety contempt citation, if noteworthy for the degree of bitterness and disputation aroused. *Shillitani v. United States*, 384 U.S. 364 (1966). The contemnors clearly could have discharged the requirements of the Decree at any time and thereby terminated the civil contempt finding and the attendant sanctions. In this setting, the course chosen by the district court was not an abuse of discretion. *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146 (9th Cir. 1983) ("A court has the power to adjudge in civil contempt *any person* who willfully disobeys a specific and definite order requiring him to do or refrain from doing an act.").

B. THE DISTRICT COURT HAD NO LESS INTRUSIVE ALTERNATIVE

Petitioners make much of the NAACP's support for the entry of an order creating the Yonkers Affordable Housing Commission and suggest that the district court abused its discretion by failing to adopt a course less intrusive upon legislative perogatives. Respondent NAACP supported this option not because it was any less intrusive. To the contrary, the NAACP contended that the City's inaction, between 1986-1988, justified the divesting of City officials, including the legislature, of all authority relating to implementation of the HRO.

This proposal represented a more radical and deeper intrusion into local autonomy than the course chosen by the district court. As the district court recognized in commenting upon the suggestion that it take over the City, "this court is not eager to assume any greater role than the circumstances require, not out of a lack of interest, concern or power, but rather a concept of what the proper role of a federal court is in circumstances like this one." (A-357).

Instead, after broaching other alternatives, the district court sought to hold the City to the course of conduct *it* had

agreed to perform. Rather than impose what the NAACP viewed as the necessary divesting of power from recalcitrant and obstructive local officials, the district court merely required them to discharge assumed obligations. No case cited by petitioners suggests that the district court's course was *more* intrusive than that supported by the NAACP.[25]

Moreover, contrary to their disingenuous position before this Court, in the district court, no petitioner supported the appointment of a commission or a master to assume control over Yonkers' municipal affairs as a less drastic alternative than the course reflected in the July 26, 1988 Order. Indeed, the City expressly questioned the district court's authority to so proceed (A-377-379).[26]

In this light, the district court chose the least intrusive course of action and this should be sustained.

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25. The cases petitioners cite do not show that the district court had a less intrusive alternative. In *Spain v. Mountanos*, 690 F.2d 742 (9th Cir. 1982), a state comptroller appealed from an order requiring him to pay state funds for plaintiff's attorney fees despite refusal by the state legislature to authorize such payment. The Ninth Circuit upheld the order noting that a state cannot frustrate such an award "by setting up state law barriers to block enforcement." (at 745). Likewise, in *Gary W. v. State of Louisiana*, 622 F.2d 804, 622 F.2d 804 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981), despite similar legislative disapproval, the district court required state officials to pay attorneys fees. *Also see, Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980), *rehg. granted*, 636 F.2d 942 (1981). In these cases, the district courts directed the official authorized by state law to make disbursements required by federal law. In Yonkers, the local entity required to pass legislation, the City Council, was directed to perform that role, as it had agreed to do. Thus, these precedents suggest that there was no less intrusive course available to the district court to gain compliance with the commitment Yonkers had undertaken.

26. Repeatedly, the City Council refused to concede that the district court had the authority to appoint a commission to discharge its obligations under the long term plan. Now, the petitioners, having opposed this course below, strenuously submit that the district court abused its discretion by not proceeding in that, assertedly less intrusive, manner.

C. THE DOCTRINE OF LEGISLATIVE IMMUNITY DOES NOT CONTROL THIS CASE

Petitioners each suggest that the doctrine of legislative immunity controls this case. We strongly disagree. Assuming *arguendo* that this Court extends the doctrine of legislative immunity to local legislators, the question is whether that would or should affect the outcome in this case.

At the threshhold, the action required here was *not* legislative and thus petitioners should gain no protection from the doctrine of legislative immunity. As its express terms were established by court order, the instant legislation did not allow petitioners to exercise legislative judgment or balance their social concerns against plaintiffs' constitutional rights. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (privilege applies only to actions taken within legislative sphere).[27]

Nor did the required act implicate any other traditional function of the legislative body. *Cf. Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1962) (recognizing legislative immunity "in the sphere of legitimate legislative activity" including investigative functions); *Oates v. Marino*, 106 A.D.2d 289 (2d Dep't 1984) (statements made by legislative aide do not make out claim of defamation as legislative immunity applies to comments which arose out of acts taken in legislative sphere).

Finally, the required vote was not a self-initiated act common to legislative bodies and required for their appropriate discharge of duty. *Cf. Eastland v. United States Servicemen's Fund*, 423 U.S. 491, 502 (1971) ("The purpose of the [speech or debate] Clause is to insure that the legislative functions the Constitution allocates to Congress may be performed *independently.*") (emphasis supplied); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980) ("The purpose of [the]

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27. Of course, we are *not* suggesting that the clearly "unworthy purpose" of the majority of the Yonkers' City Council, *Tenney, supra.*, at 377, represented fully by these petitioners, defeats their claim. Rather, the context in which they acted, as we demonstrate, was simply not legislative as understood by this Court's prior cases.

immunity is to insure that the legislative function may be performed independently without fear of outside interference.")[28]

To the contrary, both the requirement that the Council enact the long term housing ordinance and the provisions of that ordinance had been settled before the Council vote. This remedial imperative and its source deprived the City Council of "independence" of action. Indeed, our context differs markedly from any of those in which courts have upheld extension of the doctrine of legislative immunity to local legislators. *Star Distributors Ltd. v. Marino*, 613 F.2d 4, 10 (2d Cir. 1980) (noting the inapplicability of immunity doctrine to enforcement setting as in *Bush v. Orleans Parish School Board*, 191 F.Supp. 871 (E.D.La.) (3-judge court), *aff'd sub. nom. Denny v. Bush*, 367 U.S. 908 (1961); *Cf. Lake County Estates Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (suit challenging land use regulation which assertedly took petitioner's property without due process); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980) (diminution of plaintiff's property value from rezoning claimed to violate takings clause).[29]

During the months following entry of the January 1988 Consent Decree, the City Council voluntarily abdicated its role in determining the specifics of the legislation. For that, fault lies with the council members themselves. In light of their default, plaintiffs proposed that the court require the City's experts to draft an appropriate long term Housing Plan. This was done, commented upon by *all* parties and approved by the court in late June 1988. The "legislation," derives directly from the Plan

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28. We note that Spallone addresses the actual context of the July 26, 1988 order in footnote 46, weakly stating, without any argumentation, that even under the circumstances, absolute legislative immunity must apply (Brief at 26).

29. Chema insists that what is at stake here is the "independent performance of the legislative function." *See*, Reply Brief, February 23, 1989, at 8, but this is simply not based upon an accurate representation of the context out of which this case arises.

and placed before the Council on July 26, 1988, was not subject, then, to legislative debate and amendment. Instead, the district court required its enactment to remedy underlying constitutional violations. That the district court might have allowed constructive and reasonable amendments to the ordinance does not alter the fact that passage of the ordinance was a ministerial, not a legislative act, and bore no indicia of legislation as that process is conceived of for purposes of the Speech or Debate clause or the comparable common law privilege."[30] *Lake County Estates Inc., supra,* at 404-405.

Moreover, the rationale for the common law doctrine of legislative immunity is straightforward and without application here: our system of checks and balances places beyond sanction the legislative acts of individual legislators. This protects legislators from the distractions and expense of litigation. It allows them to cast legislative votes in a manner calculated to represent their constituents. Allowing suit against individual legislators would inhibit legislative functioning and establish a serious disincentive to service. This would in turn stifle public service and counter "the public good." *Tenney, supra.,* at 377.

Where contempt sanctions against local legislators arise from their own violation of settled court orders, this logic simply has no bearing. Here, there was no need or occasion for Yonkers' legislators to balance social needs against constitutional rights. That process had already occurred. Indeed, unlike a suit against local legislators for their self-initiated actions,

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30. This, too, separates the concerns raised here from those cited by Chema in suggesting that he was being forced to engage in compelled speech and to mis-represent his constituents. Chema was under a court order to vote for the ordinance. No one pretends that, by casting a vote in favor of the ordinance, Chema was expressing his *personal* support for that ordinance. Indeed, he was free to and did repeatedly clarify his opposition. However, the proper means of amending extant municipal zoning ordinances is through legislation and thus the Consent Decree contemplated such action. Chema had no right as an elected official to violate the Decree on the basis of his personal views; he had every right to express his reservations while complying with the court order.

here, the vote in question followed court order and no citizen could sue the council members for their required vote.[31] *Owens v. City of Independence*, 455 U.S. 622, 658 (1980) (recognizing that whether immunity extends to city officials under 42 U.S.C. sec. 1983 depends on functional analysis and the interests at stake).

In the instant case, a federal court found serious and gross violations of constitutional rights in litigation directed at municipal entities, not individual legislators. No argument can be made that the initial suit implicated the doctrine of legislative immunity as none of the legislators were sued in their official or individual capacities.

In remedying the serious adjudicated violations, the parties ultimately determined that certain legislative acts would be required. The City Council itself agreed. The district court found the parties' agreement satisfactory and entered its order. The necessary legislation, the City Council balked. This left the district court and the plaintiffs without implementation of the required and necessary remedial actions and the city in contempt.

Here, then, the policy considerations underlying the doctrine of legislative immunity are absent and another set of policy concerns instead dominate. Can legislators thwart with impunity the obligations they have voluntarily undertaken and escape without sanction? If so, for what reason? We submit that recognizing the doctrine of legislative immunity does not compel reversal of the decisions below.

In short, where a municipality has been found to have violated the Fourteenth Amendment, its agents and officers are

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31. Yonkers has never appealed from the court orders requiring it to enact the long term housing legislation or from any aspect of that required legislation. Had the City Council, which dictates the City's legal positions in this suit, any legitimate objection to the provisions of the long term ordinance, it properly should have authorized an appeal of those provisions it felt exceeded appropriate equitable authority or were otherwise impermissible. In so proceeding, Yonkers could have sought entry of a stay to prevent any irreparable harm claimed from such provisions.

responsible for complying with the injunctive relief required to remedy the condition. If, as here, the local officials abdicate responsibility for devising an appropriate remedy, that responsibility falls to the district court. Where the legislative body agrees on a course of conduct requiring the passage of legislation to cure the constitutional violation, members may be held personally responsible should they abnegate their duties and fail to comply.[32]

We submit that such a legal doctrine recognizes two sets of principles: in the normal discharge of their legislative duties, local legislators have immunity against prosecution and sanction. However, where their action is required to cure constitutional violations, local legislators may be compelled to participate in the remedial process. *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 233 (1964). ("...the district court may if necessary to prevent further discrimination require the Supervisiors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate and maintain without racial discrimination its public schools system in Prince Edwards County.").

Failure to comply would subject legislators to the typical range of sanctions available against contumacious defendants.[33]

Nor did the finding of civil contempt or imposition of sanctions entail prohibited inquiry into legislative motives. While the doctrine of legislative immunity protects members *regardless* of the validity of their legislative actions and shields members from questioning concerning their motives, *Brewster, supra.,* at 508, this issue has no currency here. Petitioners were not held in contempt or sanctioned because of their motives or beliefs, but,

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32. Chema submits that even in such a setting, he must have the latitude to vote "No," and, implicitly, to perpetuate the unconstitutional conditions the underlying order seeks to remedy. He provides no basis for this license. Nor does invocation of the responsibility of the legislator to his constituents support Chema's position. Constituents have no right to expect their representatives to perpetuate unconstitutional conditions. *Cf.* Chema's Reply Brief, February 23, 1989 at 5.

33. Spallone addresses this argument in footnote 46, p. 26 but provides no basic argument against its tenability.

rather because they failed to comply with an extant and valid court order.

As Petitioner Spallone concedes, this outcome is consistent with that contemplated in *Griffin, supra.* at 233 where this Court expressly approved the district court's authority to require local legislators to take those actions necessary and sufficient to reopen and operate non-discriminatorily that County's school system. Unless one reads that requirement as purely advisory and unsupported by resort, if necessary, to the court's arsenal of enforcement authority, including contempt, then it follows that, in certain remedial contexts, the common law doctrine of legislative immunity meets its limit. *Hutto v. Finney,* 437 U.S. 678 (1978) ("a federal court's interest in orderly, expeditious proceedings justified any reasonable action taken by the court to secure compliance with its orders.")

Nor is such a recognition of limits unique or anomalous. Even our most cherished First Amendment rights are not absolute. *Nebraska Press Association v. Stuart,* 423 U.S. 1319 (1975). The doctrine of executive privilege is limited by the imperatives of our criminal justice system. *United States v. Nixon,* 418 U.S. 683, 719-713 (1974). Even the Speech or Debate Clause itself does not protect a member from criminal liability for acts arguably within his legislative functions. *Gravel v. United States,* 408 U.S. 606, 627 (1972).

While the precise question presented here—whether a federal common law speech or debate privilege insulates local legislators from a finding of contempt and contempt sanctions when they violate clear orders arising from the need to vindicate constitutional rights—has not been settled, prior cases uphold the reach of federal authority to remedy violations of fundamental rights.

In *Milliken v. Bradley,* 433 U.S. 267 (1977), this Court affirmed an order requiring the State of Michigan to pay the costs of programs required to cure unconstitutional conditions stemming from discrimination and segregation in Detroit's public schools. Had Michigan failed to appropriate such funds, contempt sanctions would have been fully appropriate as a means of insuring compliance.

Petitioner Spallone blithely submits that recognition of the

doctrine of legislative immunity "will not deprive plaintiffs in this action of enforcement". This analysis is shallow: plaintiffs have contended and the lower courts found that the discriminatory actions of the Yonkers City Council have blocked minority mobility and signalled hostility toward racial minorities. The council's continued contumacious conduct has the intended effect of continuing this deprivation of minority rights.[34]

Moreover, any argument which rests on giving voice to the electorate in a situation like this is, at best, ironic. The lower courts have held that the Yonkers City Council translated discriminatory private sentiments into public policy and thereby resisted minority mobility in the City. The same sentiment overwhelmed the political process after entry of the Consent Decree in January 1988. Now, Spallone and other petitioners defend the doctrine of legislative immunity as necessary to vindicate the will of the majority. Again, the rights of racial minorities, so callously violated for generations, are subjugated.

This issue is not, as Spallone casts it (Brief t 30-31), to protect the council members who would continue to resist constitutional dictates, but the right to redress of racial minorities who are the victims of racial discrimination.

D. PETITIONERS HAVE NO INDEPENDENT FIRST AMENDMENT RIGHT WHICH PERMITS THEM TO VIOLTE THIS COURT ORDER

One petitioner, Chema, asserts that by directing him how to vote, the district court invaded his First Amendment right to freedom of speech. It is undeniable that no court has sought to

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34. Spallone also suggests (Brief at 30) that upholding the Court of Appeals for the Second Circuit's decision will diminish the "willingness of legislators to approve consent decrees." To the contrary, reversal of the Second Circuit's opinion will make the obligations undertaken by municipalities in Consent Decrees unenforceable as against those who specifically approved them, the local legislators, and increase the incentive for individual legislators to change their votes should popular opposition surface to the obligations undertaken.

limit any utterance of Chema's. Nor can Chema deny that he has taken full advantage of the protections of the First Amendment, engaging in continual attacks on the district court and the propriety of the Consent Decree.

Chema cites no case which recognizes the "right" of a legislator to violate court orders claiming that they impinge on his First Amendment right. This case does not resemble those in which legislatures sought to compel private citizens to engage in acts violative of his/her religious or political philosophy. Nor is the Court being asked to review an enactment which arguably chilis legitimate political activism. *Cf., Meyer v. Grant,__U.S.__, 108 S.Ct. 1886; 100 L.Ed. 425 (1988),* or dissent in an overbroad manner. Finally, unlike *Wzeski v. City of Madison,* 558 F.Supp. 664 (W.D.Wis. 1983), the Court is not now asked to review a legislative enactment requiring, with no compelling basis, a legislator to vote on each occasion a resolution is introduced before the body on which (s)he serves. That case involved no compulsion dictated by the compelling ground of vindicating adjudicated constitutional rights as manifest in the orders derived from the January 1988 Consent Decree.

Instead, in his official capacity, as a City council member, Chema bears responsibility for helping to cure unconstitutional conditions. He cannot wriggle loose from this obligation by claim that a right *personal* to him would be violated should *he be forced to use his legislative* powers in conformance with the constitution and settled orders. As a person, he is being forced to make no compelled speech. As a legislator, he is being required to take acts made necessary by the adjudication of unconstitutional conduct.

As the Second Circuit correctly held, should the performance of such duties be anethema to Chema, he may hand the authority of governance to a person fully prepared to discharge his/her office in furtherance of the Constitution of the United States. If he retains his office, he must be held responsible for his obstruction of the remedial process lest the constitutional guarantees enjoyed by other citizens he cheapened and he be permitted to act above the law.

Petitioner cites to First Amendment cases without application here. In *Boos v. Barry,* 99 L.Ed. 2d 333 (1988), reiterating

that the First Amendment reflects "a profound national commitment" to the principle that "debate on public issues should be uninhibited, robust and wide open," *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), the Court invalidated a District of Columbia law restricting the display of "critical" signs within five hundred feet of foreign embassies. Such a content-based ban on speech clearly infringed upon the free-flow of ideas and represented a form of censorship.

Here, Chema was permitted to engage in as free a flow of ideas as he pleased. Indeed, City Council meetings became spectacles at which opponents of the Consent Decree never-endingly vented their hostility at the court; the OHA and the plaintiffs. The district court never considered, let alone entered, any order directed at this speech.

On the other hand, permitting such a free exchange of ideas, whatever their content, differs from allowing those with political authority to flout their constitutional function and ignore or exacerbate the adjudicated violation. ". . . .[I]t is the reason alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government." Hamilton, *Madison & Jay* "The Federalist Papers," No. 50, Mentor Books, 1961.

Chema points to no case in which a legislator, desirous of avoiding *that* responsibility, successfully invoked the First Amendment as a shield. As in *Bond v. Floyd,* 385 U.S. 16 (1966), where the Georgia State Assembly had "no interest in limiting. . . .legislators' capacity to discuss their views of local or national policy," the district court entered no injunction prohibiting speech. It did, however, seek to hold members of the legislative body to their obligation. Nor in general does a "freedom of speech" defense absolve a person who commits contempt in the presence of a court. *Taylor v. Hayes,* 418 U.S. 488 (1974). This should not be the first such occasion for recognition of either doctrine."

35. Chema's First Amendment argument falls for precisely the same reason his legislative immunity argument does: both are expressly predicated on the notion that Chema retained "independence" to engage in legislative acts. P ıt this is simply a fiction in this context. Chema's vote was compelled in furtherance of a remedy of constitutional violations. Nothing in either decision below purports to limit a legislator's discharge of his obligations, and the attendant freedoms of speech and vote, in the normal legislative setting.

E. THE LONG TERM ORDINANCE WAS FULLY CONSISTENT WITH THE CONSENT DECREE

Chema submits that because the long term ordinance contemplates a role for the Office of Implementation and the Planning Board, it divested the City Council of powers it had reserved in the January Consent Decree. This is fatuous. The powers provided the former two bodies are purely advisory and the long term ordinance maintained the City Council's ultimate role in approving any mix of municipal incentives provided to developers. (A-310, Section B).

Contrary to Chema's misinformed Brief (at 47), the long term plan ordinance did *not* remove "all discretion" from the Council; rather, the Council retained discretion to alter zoning to accommodate the needs of a given developer and to determine the appropriate mix of incentives required to stimulate any given project.

F. THE CONSENT DECREE WAS FULLY CONSENSUAL

After entering into the Consent Decree, council members faced substantial political pressures. This caused Longo and Fagen, who had voted for the January 27, 1988 resolution approving the Decree, to align with Chema and Spallone, who had not. This coalition began asserting, as it now does before this Court, that the Decree itself was non-consensual and coerced.

The district court clearly and justifiably threatened the City with contempt on several occasions before the City Council voted to adopt the Consent Decree. Hoever, the district court had cause and basis for these threats and to the extent they finally prompted the council to agree to sites for the 200 units of public housing, the threats were useful and achieved their objective. In railing against these threats, petitioners conveniently ignore that *their inaction and obstructiveness* created the crisis situation Yonkers faced. They failed to submit sites for the 200 units of public housing (by September 1986, as required). They failed to devise any form of long term housing plan (by November 1986, as required). They acted as if the district

court's authority was a nullity, of no moment to themselves. They rallied public antipathy against the federal court in a display of dastardly cowardice.

As futile as is his argument that he was finally coerced into following the constitution, Chema's suggestion that a succeeding legislative body can undo the acts of a first is ill-taken. Here, the legislative act-approval of a Consent Decree-ripened into a binding court order. Is Chema suggesting that the legislature retains, as against a federal district court, the authority to disengage from settled obligations when it is so motivated? *Cf.* Brief at 43. Again, the fundamental misconception of petitioners' argument surfaces; they do not have "unfettered" authority to violate court orders, so long as they do so through votes.

CONCLUSION

This case raises questions of great moment for our constitutional system. But, the crucial issues are *not* those petitioners bring before this Court. Instead, the singular issue to be addressed is whether the rule of law applies to individual legislators who flout court orders. Here, each of these petitioners had appropriate notice of the relevant order, and an opportunity to justify his failure to abide. Each provided no basis for his action. Instead, capitulating to rampant majoritarianism, these petitioners seek support for their recalcitrance from this court. Improperly analogizing themselves to local legislators who have *not* violated extant court orders, petitioners seek to have this Court extend legislative immunity in a matter calculated to diminish the authority of federal courts and to strip the arsenal of responses necessary where such contemptuous conduct occurs.

In our judgment, the public good will be much better served by affirmance of the decisions below as they sensitively treat the particular context, doing no violence whatsoever to the general principles of legislative immunity and freedom of speech.

Respectfully submitted,

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MAY 30, 1989